UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BUSINESS CREDIT LEASING, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
CITY OF BIDDEFORD and BIDDEFORD SCHOOL DEPARTMENT,	)	
	)	***Civil No. 90-0282 P***
Defendants and Third-Party Plaintiffs	)	
	)	
v.	)	
	)	
INSTRUCTIONAL SYSTEMS, INC.,	)	
	)	
Third-Party Defendant	)	

MEMORANDUM DECISION ON THIRD-PARTY DEFENDANT'S MOTIONS TO SET ASIDE DEFAULT AND FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE PLEAD

This case is before the court on motions by third-party defendant, Instructional Systems, Inc. (``ISI''), to set aside default and for extension of time to answer or otherwise plead.[1] For the reasons stated herein, the motions are denied.

I. BACKGROUND

[1] I deny the third-party defendant's request for a hearing on its motions. *See* Local Rule 19(f).

This lawsuit arises from two contracts. On or about April 17, 1989 the Biddeford School Department (``Biddeford") and ISI entered into an agreement (``ISI Agreement") whereby ISI undertook to provide and service a computer-assisted instructional pilot program within the Biddeford school system. *See* Third-Party Complaint & 7 and Exh. A thereto. On or about September 21, 1989 Biddeford and Business Credit Leasing, Inc. (``BCL") entered into an agreement (``BCL Agreement") whereby BCL leased certain computer equipment to Biddeford for use with the ISI pilot project. Exh. 1 to Complaint.

By letter dated March 20, 1990 the superintendent of Biddeford informed ISI that Biddeford was cancelling the ISI Agreement effective June 20, 1990. *See* Exh. D to Affidavit of Benore Buffa (``Buffa Affidavit"). On or about June 26, 1990 Biddeford notified BCL that it was terminating the BCL Agreement and that ISI would take over the lease pursuant to the ISI Agreement. *See* Exh. 1 to Complaint. The ISI Agreement provides, in part:

> Biddeford has the right to cancel this agreement after the first year of operation. If Biddeford opts to cancel, Instructional Systems will take over the equipment lease and remove the equipment.

See Exh. A to Third-Party Complaint.

On November 30, 1990 BCL filed suit against Biddeford seeking damages in the amount of $504,975 for breach of contract. Biddeford answered the complaint on December 19, 1990 and also filed a third-party claim against ISI alleging that, under the ISI Agreement, ISI is obligated to pay the balance due under the BCL Agreement. Third-Party Complaint && 13, 16. ISI has refused to assume responsibility for the BCL Agreement. *Id.* & 14.

Pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii), Biddeford's third-party complaint and summons was served by first-class certified mail, return receipt requested. Affidavit of Lisa D. Labonte & 2 (``Labonte Affidavit"); Exh. B to Memorandum of Third Party Plaintiffs City of Biddeford and

Biddeford School Department in Opposition to Third Party Defendant Instructional Systems, Inc.'s Motions to Set Aside Default and For Extension of Time to Answer (``Memorandum of Third-Party Plaintiffs"). Delivery was made on ISI's registered agent on December 24, 1990; the agent acknowledged receipt on January 7, 1991. Exhs. B, C to Memorandum of Third-Party Plaintiffs. Biddeford did not receive ISI's answer within 20 days of January 7, 1991, *see* Fed. R. Civ. P. 12(a), and default was entered on January 30, 1991. A subsequently filed application for entry of default judgment was denied. On February 15, 1991 ISI filed its motions to set aside the default and for extension of time to file its answer.

II. DISCUSSION

Under Fed. R. Civ. P. 12(a), a defendant must serve his answer within twenty days after service of a summons and complaint. If it fails to do so, Rule 55(a) provides that the clerk of the court ``shall enter the party's default."[2] Under Fed. R. Civ. P. 55(c), the court may set aside an entry of default ``[f]or good cause shown." The decision whether to set aside an entry of default is left to the court's discretion in light of the particular circumstances in the individual case. *Phillips v. Weiner*, 103 F.R.D. 177, 179 (D. Me. 1984).

This court has ``identified six factors to be considered in the exercise of its discretion: (1) the excuse for the delay; (2) the existence of a meritorious defense; (3) prejudice to the other party; (4) the amount of money involved; (5) the good faith of the parties; and (6) the timing of the motion to set

[2] Entry of default is to be distinguished from judgment by default. Entry of default is merely ``an interlocutory step that is taken under Rule 55(a) in anticipation of a final judgment by default under Rule 55(b)." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, ' 2692 at 465 (1983).

aside the default." *Grover v. Commercial Ins. Co.*, 108 F.R.D. 366, 368 (D. Me. 1985) (citing *Phillips v. Weiner*, 103 F.R.D. at 179).

A. Excuse

ISI offers two primary reasons for its delay in answering the complaint: (1) the attorney assigned to answer the complaint had a busy trial schedule at the time and (2) he mistakingly believed that he had 35 days to respond to the complaint. Neither reason establishes justifiable excuse.

ISI is represented by a New Jersey law firm. Affidavit of Warren S. Robins in Support of Motion to Vacate Entry of Default and in Opposition to Motion to Enter a Default Judgment & 1 (``Robins Affidavit"). Warren S. Robins, a partner in the firm, was assigned to answer the complaint against ISI. Robins Affidavit && 1, 5. Robins was lead counsel in a case that was tried from January 7, 1991 to January 29, 1991. *Id.* & 6. ``Sometime during this period," he contacted Biddeford's counsel and requested a copy of the third-party complaint. *Id.* & 7. Robins states that attempts were made by his firm and another firm to engage local counsel to represent ISI. *Id.* & 8. No local counsel was ever retained and the complaint remained unanswered, apparently misfiled. *Id.* & 12. Robins discovered only on February 14, 1991 that no answer had been filed. *Id.* & 10. He immediately retained local counsel and prepared an answer, which was tendered for filing in this court on February 15, 1991. *Id.* & 13.

While a trial is certainly time consuming, ISI offers no reasonable explanation as to why someone from Robins' firm did not retain local counsel during his three-week trial period. Robins does assert that his office attempted to engage counsel, but there is no indication as to why the task was not completed. In fact, once Robins became aware of the problem on February 14, it took him only a few hours to retain local counsel.

In addition to being distracted by his trial schedule, Robins states that he believed he had 35 days to answer the complaint.[3] *Id.* & 9. I find this explanation equally without merit. Robins should have known -- and certainly could have discovered -- that unless this court's local rules specifically modified the timeframe for answering a complaint, the governing federal rule would control. In any event, the summons specifically states that a failure to answer the complaint within 20 days of service would expose ISI to an entry of default. *See* Exhibit D to Memorandum of Third-Party Plaintiffs. ISI could have asked for an enlargement of time pursuant to Fed. R. Civ. P. 6(b) at any time during the 20-day period.

In sum, failures in inter-office communications and procedures and lack of attention to procedural rules ``reflect[] carelessness in clerical or technical practices" and do not rise to the level of justified excuse. *Grover v. Commercial Ins. Co.*, 108 F.R.D. at 368.

B. Meritorious Defense

Courts consider the existence of a meritorious defense in order ``to determine whether there is some possibility that the suit will have an outcome different from the result achieved by default." *Phillips*, 103 F.R.D. at 181 (citations omitted). ``Generally, a federal court will grant a motion under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default . . . is allowed to stand . . . ." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 2697 at 525 (``Wright, Miller & Kane"). ``[T]he Court is not to weigh the facts. Rather, the Court must determine whether the defense has merit for pleading purposes." *Grover*, 108 F.R.D. at 368. Under this standard, the party moving to set aside the default is

[3] Apparently, an out-of-state corporation has 35 days to file an answer under New Jersey's local rules.

not required to demonstrate a likelihood of success on the merits. *Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989). ``[A] party's averments need only plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense." *Id.* (citations omitted).

ISI raises a contract-interpretation defense.[4] Memorandum in Support of Instructional Systems, Inc.'s Motions for Leave to File Late Answer and to Set Aside the Default and in Opposition to Biddeford's Application for Default (``ISI Memorandum") at 1. ISI claims that the cancellation provision in the contract between ISI and Biddeford is ambiguous and that extrinsic evidence would show that Biddeford breached the contract. ISI asserts that, regardless of the language of the provision, there was a common understanding that the provision was restricted by two conditions: Biddeford could only cancel the contract if (1) the performance goal was not met or (2) if Biddeford believed that ISI had in any way misrepresented the features or benefits of the instructional program.

The Maine Supreme Judicial Court (``Law Court") has held that ``[t]he construction of an unambiguous written contract presents a question of law for the court to determine." *Hopewell v. Langdon*, 537 A.2d 602, 604 (Me. 1988) (citation omitted). ``The issue of whether contract language is ambiguous in the first instance is likewise one of law." Id. (citing *Portland Valve Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1387 (Me. 1983)). The Law Court has also stated that

> [t]he interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence. Once an ambiguity is found then extrinsic evidence may be admitted and considered to show the intention of the parties. Contract language is

[4] ISI's memorandum appears also to suggest a defense of interference with a contractual relationship. *See* Memorandum in Support of Instructional Systems, Inc.'s Motions for Leave to File Late Answer and to Set Aside the Default and in Opposition to Biddeford's Application for Default at 2 (``ISI Memorandum"). However, ISI's memorandum does not elaborate on how this defense has any bearing on the outcome of the instant suit. If, in fact, the named party did interfere with ISI's performance under the contract, ISI would have a claim against that party, but such a claim would not affect Biddeford's rights under the ISI Agreement.

> ambiguous when it is reasonably susceptible of different interpretations.

Portland Valve, 460 A.2d at 1387 (citations omitted).

Affidavits have been submitted by both parties to support and refute the ambiguity of the cancellation clause. However, I find no basis for resorting to an examination of this extrinsic evidence. The language of the cancellation clause -- and the language within the ``four corners" of the ISI Agreement -- is not ambiguous. There is nothing in the contract that could be construed to limit Biddeford's right to cancel the Agreement after one year. I conclude that the unambiguous language of the contract would compel an identical outcome were this suit allowed to proceed on the merits.

C. Substantial Prejudice

Biddeford concedes that it will not suffer substantial prejudice if this default is set aside. *See* Memorandum of Third-Party Plaintiffs at 9-10. ``[E]ven though courts frequently express a concern for the party not in default, they generally conclude that no substantial prejudice will be caused by granting relief in the case before them." 10 Wright, Miller & Kane ' 2699 at 534 (footnote omitted). But as this court has stated, ``a showing of *substantial* prejudice is not a *sina qua non* to the denial of a Rule 55 motion; it is merely one of the factors a court should consider." *Maine Nat'l Bank v. F/V Cecily B.*, 116 F.R.D. 66, 69 (D. Me. 1987) (emphasis in original).

D. Other Factors

As previously stated, other factors to be considered in ruling on a Rule 55(c) motion are the amount of money involved, the good faith of the parties and the timing of the motion.[5] The potential

[5] Defendant ISI also asserts that the default should be set aside because its counsel was never served with the ``Application for Entry of Default Judgment filed on February 1, 1991." *See* ISI Memorandum at 6. The application for default judgment, having been denied, is not at issue here. The only matter now before the court is the motion to set aside the entry of default.

liability of ISI in this case is approximately $500,000, the amount of damages sought by BCL against Biddeford. This is certainly not an insignificant amount of money. Even though ISI must have been aware of its potential liability if Biddeford decided to cancel the contract, the impact of a half million dollar judgment weighs in favor of granting the motion.

I find no evidence of bad faith or wilfulness on ISI's part. As soon as Robins became aware of the default on February 14 he contacted local counsel. Local counsel filed the applicable motions on February 15. While this quick response shows a good-faith effort to remedy the default, it does not excuse the considerable gap between the date the answer was due and the date the motion was filed to set aside the default.

ISI, through its registered agent, knew on January 7 that an answer was due on January 28, 1991. The default was entered on January 30. Almost three weeks had passed between the time the answer was due and the motions were filed. While it is true that Robins filed the motions one day after he discovered that no answer had been filed, this court has noted that ``the relevant date for purposes of evaluating the equities of the situation is the date on which the answer was due rather than the date on which the default was actually entered." *Maine Nat'l Bank*, 116 F.R.D. at 69. ``[A] three-week delay after the due date is strong evidence of lack of diligence." *Id.*

III. CONCLUSION

I am mindful that it is preferable to try a case on the merits rather than disposing of it through procedural means such as default. However, consideration of the pertinent factors leads me to conclude that the default should not be set aside. It is true that the case is monetarily significant, that the plaintiff would not suffer substantial prejudice if the default were set aside and that the defendant has not shown bad faith to any significant degree. Nonetheless, the opposing factors weigh in favor of denial.

The third-party defendant has offered an unacceptably weak excuse for its delay. Its untimely pleading practices show a lack of diligence and a disregard of the court's procedural rules. Finally, ISI has not proffered a meritorious defense. Weighing each of the six factors, I conclude that on balance they counsel denial of the motion to set aside the default.

Accordingly, the third-party defendant ISI's motions to set aside default and for extension of time to answer or otherwise plead are ***DENIED***.

Dated at Portland, Maine this 30th day of April, 1991.

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David M. Cohen
United States Magistrate Judge